

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, PETITIONER

v.

THE OHIO POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

**MOTION OF THE UNITED STATES FOR LEAVE TO FILE A
PETITION FOR REHEARING**

The United States, by its Solicitor General, moves that this Court grant leave to file a second petition for rehearing of the denial by this Court of a petition for a writ of certiorari to the United States Court of Claims.

The accompanying petition sets out intervening circumstances which represent substantial grounds for granting the petitions for rehearing and for a writ of certiorari.

The petition for a writ of certiorari was denied on October 17, 1955 (350 U. S. 862), and a peti-

tion for rehearing was denied on December 5, 1955 (350 U. S. 919). The Court's action was thus taken more than 25 days prior to this petition for rehearing.

This Court has granted petitions for rehearing which were filed after the expiration of the time prescribed by the Rules of this Court. See, for example, *Clark v. Manufacturers Trust Co.*, 337 U. S. 953, 338 U. S. 241, 242; *Stone v. White*, 300 U. S. 643. An incomplete check reveals that the Court has granted out-of-time petitions for rehearing at least twenty-five times in the last twenty years. It is plain therefore that the Court has not divested itself of the power to consider such petitions for rehearing and that, where meritorious grounds exist, leave to file a successive petition for rehearing may be granted even though the petition for rehearing is not filed within the period set forth in Rule 58 in which petitions for rehearing may be filed as of right. We submit that the accompanying petition for rehearing should be accepted for filing and granted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1956.

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PETITION FOR REHEARING

The petition for a writ of certiorari in this case stated the following two questions:

1. Whether the War Production Board in issuing necessity certificates for accelerated amortization had authority to certify only part of the cost of a new facility.

2. Assuming the Board had no statutory authority to issue partial certifications, whether it was proper for the Court of Claims to allow the taxpayer to amortize the full cost of the facility, even though the certifying agency had refused to do so.

In *Commissioner v. National Lead Co.*, 230 F. 2d 161, decided subsequently to the denial of certiorari in this case (350 U. S. 862) and to the denial of a petition for rehearing (350 U. S. 919), the Court

of Appeals for the Second Circuit held, contrary to the decision of the Court of Claims in this case, that a taxpayer had no standing to make a collateral attack on a certificate issued by the War Production Board for part of its costs by seeking in tax litigation an amortization deduction based on 100 percent of the cost of the property. It should have sought review through an action against the War Production Board for mandamus or for an injunction. Consequently, while the Second Circuit found it unnecessary to pass on the first question stated in the petition for a writ of certiorari in this case, it answered the second question in a manner directly contrary to the decision of the Court of Claims.

After the decision in *National Lead, supra*, the Court of Claims again passed on the identical question in *Allen-Bradley Co. v. United States*, decided April 3, 1956. Although the court "reconsidered [its] earlier decisions in the light of the contrary decision" in *National Lead*, it decided to "adhere to the views expressed" in the present case.

The United States is filing a petition for a writ of certiorari in the *Allen-Bradley* case, asking this Court to resolve this conflict in decisions. We understand that a petition for a writ of certiorari will be filed by the taxpayer in *National Lead*. If this Court should grant these petitions, it would seem entirely appropriate that the present case

should also be reviewed, in order that consistent decisions may be entered in all three cases.

CONCLUSION

It is respectfully submitted that this petition for rehearing and the petition for a writ of certiorari should be granted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1956.

As required by Rule 58, I certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in that Rule.

SIMON E. SOBELOFF,
Solicitor General.